Filed 12/28/04 P. v. Buckelew CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JEREMY BUCKELEW, Defendant and Appellant.	A103631 (Alameda County Super. Ct. No. H33889)

I. INTRODUCTION

This is an appeal from appellant's conviction, after a jury trial, on one count of violating Penal Code section 422 by threatening to kill his mother. The sole ground of appeal is that the trial court either did not exercise, or abused, its discretion in failing to conduct an in camera review of the mother's psychiatric records which the defense had subpoenaed from a hospital. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

Appellant's mother, Karin Glisson, the victim in this case, lived in Newark with her husband, David Glisson, Sr., appellant's stepfather.[2] Appellant was Karin's son by a previous relationship or marriage, but had been raised by, and lived with, his mother and

[1] In view of the nature of the single issue raised on appeal, we will recite only those portions of the factual and procedural background directly relevant to it.

[2] For ease, we shall refer to the victim and her husband as Karin and David. Similarly, we shall refer to David's son and David, Jr. No disrespect is intended.

David until he was 15 years old. From then until he was 28, appellant lived with his grandmother in Visalia. He returned to live with his mother and David in Newark in December 2002.

Although his mother made a condition of appellant's return to her home that "there would be no drinking and no drug use," almost from the beginning things did not go well between either David or Karin and appellant. There were arguments between appellant and David during a Christmas holiday vacation at Clear Lake and, after they returned to Newark, swearing and obscenities from appellant toward his mother beginning in early February. These caused her to start fearing appellant.

In early March 2003,[3] appellant tried to prevent his mother and David from watching certain television programs; in the course of this, he often changed the TV channels and took away their remote control. Appellant, who had suddenly become a vegetarian, also forbade them from bringing meat or chicken into the house, calling them "murderers" if they did so.

In mid-March, Karin could not find the pain medications she took for her problem of constant back pain, and it turned out appellant had taken them. As a result, the Glissons installed a lock on their bedroom door.

On March 29, David, Jr. (as noted, David's son and Karin's stepson) brought over a dinner containing chicken and beef that his wife had prepared. Appellant saw Karin's plate of that food in the kitchen and spat on it; he then made a further reference to her being a murderer. David Jr. stayed at the house to make sure Karin and his father were able to eat their dinner without any further problems. Then the three of them left the house, and went to David Jr.'s nearby home to discuss appellant's recent disturbing behavior and their fear that he might become violent. Then and there they devised a code word they would communicate to David Jr. in such an eventuality.

On the following day, March 30, the Glissons returned home shortly after seven p.m., and found that the lock they had recently placed on their bedroom door had been

---

[3] All further dates noted are in 2003.

scratched, apparently in effort to unlock it. Appellant, who was lying on the living room couch watching television, laughed when his mother asked him if he had tried to get into their bedroom. Shortly after this, appellant began shouting obscenities at his mother and told David Sr., who had told him he should leave the house and live with his biological father: "Don't go to sleep." David, Sr. told appellant he had three weeks to move out, but appellant only laughed at him. David Sr. then left the room to call his son and relay the agreed-upon code word.

Appellant then tore the meat off the bones of the food Karin had set out for herself and her husband and crammed it down the garbage disposal. He then pointed his finger at her and said, very loudly: "I will kill you. I will kill you with a gun." He then repeated the threat, repeatedly saying in an angry tone: "I will shoot you tonight. I will kill you." Karin, crying and shaking at this point, grabbed her purse and coat and left the house; she was, she testified, afraid of appellant. Shortly after this, the Newark police arrived at the residence and arrested appellant, who did not resist.

On April 25, the Alameda County District Attorney filed a one-count information charging appellant with making criminal threats to Karin on March 30. Appellant pled not guilty to the charge on April 28.

Starting June 25, appellant was tried to a jury and convicted as charged. On July 30, the trial court placed him on five years formal probation and ordered him to participate in a residential drug treatment program. Appellant filed a timely notice of appeal.

III. DISCUSSION

A. *Background of the Medical Records Issue*

Shortly before the trial commenced, specifically on June 16, appellant's counsel caused to be issued and served on Kaiser Permanente Hospital in Fremont a document entitled (in the printed version) "Subpoena." Underneath that word were typed the words: "Duces Tecum." The document was not, however, a subpoena duces tecum as required by either Penal Code section 1327 or Evidence Code sections 1560-1564 because it did not contain any description of the documents requested from Kaiser. The

closest the documents served on Kaiser came to specifying what was to be produced was the following paragraphs in defense counsel's declaration supporting the subpoena: "6. On June 11, 2003, Defense counsel discovered information Karin Glisson takes psychiatric medications for reasons other than the trauma caused by the charged incident. [¶] 7. The information contained in the requested records will tend to show that Karin Glisson's fear in this case was not objectively reasonable. [¶] 8. The information contained in the requested records is manifestly relevant insofar as it will tend to exculpate Mr. Buckelew."

However, as noted, the subpoena itself did not list or identify any "requested records," but only ordered Kaiser Permanente Hospital in Fremont to "appear" before Department 516 of the Alameda County Superior Court in Hayward at 9:00 a.m. on June 23. This designation was, as it turned out, incorrect in two respects. First of all, the day following the issuance of the supposed subpoena duces tecum, the case was assigned for trial to department 509, not department 516. Apparently, however, Kaiser was not so notified. Second, and as defense counsel confessed when the trial was over, department 516 "doesn't even hear criminal matters."

Kaiser did not appear on June 23 nor did any of its records. Defense counsel so advised the court after opening statements on June 25. After a brief discussion between the court and defense counsel, it was agreed that (1) defense counsel could recall Karin as a witness (she was scheduled to testify as the first prosecution witness that afternoon) if the Kaiser records were produced and the court determined to allow examination concerning them and (2) before the jury returned in the afternoon, the court would conduct an Evidence Code section 402 (section 402) hearing regarding her use of medications and any effect those medications had on her.

A section 402 hearing was held right after a brief lunch break on June 25; Karin was examined extensively by defense counsel regarding her use of drugs generally and, particularly, her use of them on March 30. In summary, her testimony was that, although she was taking two medications for her back pain, plus a diuretic, potassium, a sleeping pill and an anti-depressant drug, none of these affected her ability to perceive and recall

or caused any form of memory loss.[4] She specifically testified that she had not taken the anti-depressant drug on March 30.

Following this testimony, the court heard argument by counsel as to what questions defense counsel would be permitted to ask Karin regarding the medications she took. In the course of this argument, the prosecutor made a specific Evidence Code section 352 objection to any extended inquiry along these lines.

After focusing defense counsel on the issue of the relevance of testimony concerning Karin's pain medication or sleeping pills, the court ruled thusly: "As far as the pain medications, you can pursue what was taken and what was concealed. As far as the other medications, I'm sustaining the 352 objection at this point. I'm going to permit you to renew the effort to seek what those medications are if you lay a foundation through your questions that demonstrates to me that there is a probative value to that information and that probative value isn't outweighed by substantial prejudice, and I'll hear what the probative value is, and we may have to do it during recess. [¶] And I'll let you make your inquiry as to why these medications were important and what her reaction was without telling us what they were and see if there's a need to inquire as to what they were at this point. [¶] Right now you're not to inquire as to what they were except the pain medication, but if at some point after your cross-examination I feel that it becomes relevant and that relevance is and that that information is permissible under 352, I will review my ruling."

After the presentation of evidence, defense counsel asked the court to issue an order to show cause why Kaiser had not responded to the subpoena and requested a continuance to resolve the issue of the outstanding request for documents. There followed an extended discussion between counsel and the court regarding defense

---

[4] Appellant's appellate counsel states in his opening brief that Karin was "currently taking three psychiatric medications." This is simply incorrect: the three medications she testified she took (aside from the two pain relief medications) were, as noted above, a diuretic, potassium, and a sleeping pill, Trazadone. Later, she testified that, via a doctor's prescription, she had taken Prozac but then switched to another anti-depressant, Effexor XR.

counsel's need for such records, including (among other things): (1) whether there was any evidence that there even were any records of psychiatric treatment of Karin by Kaiser, (2) the pertinence of our Supreme Court's ruling in *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*) regarding the use of such records, and (3) whether Karin's testimony regarding, especially, the events of March 30 suggested any possible memory loss or fabrication by her.

Following this argument, the court ruled as follows: "I don't have the psychiatric records in front of me. If they had been submitted, if they existed and they had been submitted in response to your subpoena, this Court's finding is that I would decline to review those records, because I don't find that there's been a sufficient showing of good cause. [¶] Since I would decline to review the records, if they existed, I will also indicate that I therefore will not issue an order to show cause at this point for Kaiser to appear and explain why they did not respond to your subpoena. . . . [¶] . . . I think the wisdom of *Hammon* is that the trial court is in the best position to make a decision as to whether or not there is a sufficient showing. . . . . [¶] I also want to make one other observation, Mr. Rosen, and that is simply that based on everything you've told me and based on everything that I've heard, I'm not even persuaded that records exist. I am persuaded that some record or some physician or person with authority to prescribing the two medications that we've discussed, but whether that was the product of psychotherapy and a psychiatrist's prescription or the product of an internist or a family practitioner, I don't know. [¶] Whether that was the product of Kaiser or some other provider, I don't know. I have no information. . . . It seems that you are operating on speculation and not much more."

After the trial was over, defense counsel advised the court that his office had, the preceding day, received via the county messenger service, "a sealed envelope with a copy of my subpoena duces tecum for the records from Kaiser Hospital that we've been talking about." The envelope was, apparently, addressed to the court's department 516 and forwarded by it to defense counsel. The court ordered the envelope to remain sealed, noting: "There's no reason to open it at this point."

B. ***Analysis***

The trial court's ruling was correct for at least four separate and independent reasons.

First of all, and as noted earlier, the subpoena that was served on Kaiser was not in the form required by Penal Code section 1327. That statute provides that if documents are sought a direction to that effect, plus an intelligible description of the documents, "must be contained in the subpoena." (Pen. Code, § 1327; see also Evid. Code, §§ 1560-1564.) Additionally, the imperfect subpoena that was served on Kaiser directed that its appearance be in a department that "doesn't even hear criminal matters" and not the department to which the case was assigned.[5]

Second, nowhere in the record was there any testimony that Karin was ever provided psychiatric treatment much less a prescription for "psychiatric drugs" by Kaiser. The trial court itself noted this gap when, after the close of evidence, trial defense counsel asked for the order to show cause and a continuance. The court specifically asked defense counsel why he thought Kaiser had any pertinent records; counsel responded that appellant was the source of his information. The court was understandably somewhat skeptical about this: "Can you give us something more than your client's supposition? Is there some basis that we can rely that Kaiser is the holder of these records we seek as opposed to someone else, and Kaiser Fremont specifically?"

When defense counsel responded in the negative, explaining that Karin had declined to answer questions regarding her use of anti-depressants in a telephone call, the court reminded him that he had had ample opportunity to question her under oath during the section 402 hearing, but had not even broached the subjects of (1) what doctor or institution had prescribed her anti-depressants or (2) whether she was or had been under

---

[5] Apparently at least one of these defects in the service was noted by Kaiser, because defense counsel stated that, late on the first day of trial, he had received a fax "form letter" from a Kaiser "legal clerk" noting that defense counsel had incorrectly sought the records. Defense counsel's description of this letter is unclear, and it was marked for identification only and not admitted into evidence.

psychiatric care at Kaiser or any place else. Our review of the transcript of the section 402 hearing confirms the accuracy of the court's recollection.[6]

Third, even assuming there were any such records, California law regarding the right of a criminal defendant—or even a court hearing a criminal trial—to review a complaining witness's psychiatric records effectively forbids what appellant sought here. In *Hammon*, *supra*, 15 Cal.4th 1117, the court held that the psychotherapist-patient privilege of Evidence Code section 1014 and the constitutional right of privacy set forth in article I, section 1 of the California Constitution trump a criminal defendant's Sixth Amendment right of confrontation as and when that defendant attempts to see and use the psychiatric records of a prosecution witness (there, as here, the victim) at the pretrial stage. The court held that, before a trial court may even conduct a pretrial in camera review of such records, it must first weigh the defendant's need for that information against the witness's privilege and privacy rights. But this weighing, the court held, may not be done at the pretrial stage. (*Id.* at pp. 1127-1128.)

Perhaps more importantly for present purposes, our Supreme Court has also made clear that, even at the trial stage, a criminal defendant's access to and use of psychiatric records "not generated or obtained by the People in the course of a criminal investigation" is, to say the least, problematic: "Given the strong policy of protecting a patient's treatment history, it seems likely that defendant has no constitutional right to examine [such] records even if they are 'material' to the case." (*People v. Webb* (1993) 6 Cal.4th 494, 518.)

Fourth and finally, the trial court properly considered appellant's request for both an order to show cause directed to Kaiser and a continuance under Evidence Code section 352. Our review of a court's rulings under that statute is, of course, abuse of discretion.

---

[6] The fact that, when the trial was over, an envelope addressed to defense counsel from, apparently Kaiser, was ultimately delivered to him does not mean that Kaiser in fact had any such documents. The envelope was, as noted above, never opened and, from the sketchy description of it in the record, there is no way of knowing if it contained any records at all, much less psychiatric records pertaining to Karin.

"The trial court is vested with very broad discretion in ruling on the admissibility of evidence. A trial court acts within its discretion when excluding cumulative and time consuming evidence. [Citations.] The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. [Citation.] Moreover, the trial court's ruling will be upset only if there is a clear showing of an abuse of discretion. [Citations.]" (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038.)

There was no such abuse here. In the first place, trial defense counsel had been provided an opportunity, at the section 402 hearing, to explore the issue of the medications Karin took on March 30 and was taking at the time of trial. Nothing prevented that counsel from, at that point, also attempting to learn whether she was undergoing, or had undergone in the recent past, any psychiatric treatment that might be pertinent to either her mental state as of March 30 or the state of her current memory. Not only were there no such inquiries, there were not even inquiries regarding who had prescribed the anti-depressant medications she admitted taking.

Finally, at the time it ruled on appellant's request for an order to show cause, the trial court had had the benefit of hearing and observing Karin's testimony at both the section 402 hearing and on direct, cross, redirect and recross examination over two trial days. It obviously concluded, as do we from reading that testimony, that there was nothing in it even remotely suggesting that she suffered any lapses of memory or the like.

Under all these circumstances, the trial court clearly did not abuse its discretion in denying appellant's request for an order to show cause directing Kaiser to produce any psychiatric records of Karin or for a continuance to obtain any such records.

IV. DISPOSITION

The judgment is affirmed.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Ruvolo, J.